TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 67

SOUTHPORT PETROLEUM COMPANY,
PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 1, 1941.

CERTIORARI GRANTED JUNE 2, 1941.

SUPREME COURT OF THE UNITED STATES

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[fols. 1-61]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of Southport Petroleum Company and Oil Workers International Union, Local No. 227

Cases Nos. C-477 and R-600.—Decided August 4, 1938

Oil Refining Industry—Interference, Restraint, and Coercion: expressed opposition to labor organization; discrediting union leadership; refusal to meet with outside representatives for purposes of collective bargaining—Discrimination: discharges: for union activity; charges of, not sustained as to one employee—Collective Bargaining: charges of refusal to bargain collectively, not sustained—Reinstatement Ordered—Back Pay: awarded—Investigation of Representatives: controversy concerning representation of employees—Unit Appropriate for Collective Bargaining: production and maintenance employees, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and supervisory employees; petition for separate unit for employees engaged in boilermaking trades: denied, interests of employees so engaged indistinguishable from interests of other production and maintenance employees—Election Ordered.

Mr. Warren Woods, for the Board.

Mr. F. W. Fischer, of Tyler, Tex., and Mr. Harry Dow, of Houston, Tex., for the respondent.

Mandell & Combs, by Mr. Arthur J. Mandell, of Houston, Tex., for the Oil Workers.

Mr. J. N. Davis, of Kansas City, Kan., for the Brotherhood.

Mr. Warren L. Scharfman, of counsel to the Board.

[fol. 62]

Decision

Order and Direction of Election

STATEMENT OF THE CASE

Upon charges and amended charges duly filed by Oil Workers International Union, Local No. 227, herein called the Oil Workers, the National Labor Relations Board,

herein called the Board, by Edwin A. Elliott, Regional Director for the Sixteenth Region (Fort Worth, Texas), issued its complaint dated December 1, 1937, against Southport Petroleum Company,[1] Texas City, Texas, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

On August 17, 1937, the Oil Workers also filed with the Regional Director for the Sixteenth Region a petition alleging that a question affecting commerce had arisen concerning the representation of employees of the respondent and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the Act. On November 20, 1937, the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hear- [fol. 63] ing upon due notice. At the same time the Board issued an order pursuant to Article II, Section 10 (c) (2) and Article II, Section 37 (b) of said Rules and Regulations consolidating the cases for purposes of hearing.

With respect to the unfair labor practices, the complaint alleged in substance that the respondent, on or after June 11, 1937, refused to bargain collectively with the Oil Workers, which represented a majority of the respondent's employees in an appropriate unit; that the respondent discharged four named employees between August 4 and October 15, 1937, because of their affiliation with and support of the Oil Workers; and that by these acts the respondent had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. The complaint and accompanying notice of hearing was duly served upon the respondent and the Oil Workers.

The respondent's answer denied that it was engaged in that commerce which was within the contemplation of the

[1] Erroneously referred to in the complaint before it was amended as Southport Refinery Company.

Act, and also denied the other material allegations of the complaint.

Pursuant to the notice, a hearing on both the petition and the complaint was held at Houston, Texas, from December 13 through December 17, 1937, and on January 13, 1938, before Joseph F. Kiernan, the Trial Examiner duly designated by the Board. At the hearing the International Brotherhood of Boilermakers, Iron Shipbuilders, Welders & Helpers of America, herein called the Brotherhood, moved to intervene in the representation case.[2] This motion was granted. The Board, the respondent, and the Oil Workers were represented by Counsel and the Brotherhood by the assistant vice president, and all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence [fol. 64] bearing on the issues was afforded all parties. During the course of the hearing the Trial Examiner made several rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On March 7, 1938, the Trial Examiner filed his Intermediate Report, and on March 18, 1938, a supplement thereto, in which he found that the respondent had discharged three of the four employees named in the complaint because they joined and assisted the Oil Workers. He recommended that they be reinstated with back pay. The Trial Examiner also found that the fourth employee named in the complaint was not discharged for union activity, and that the respondent had not refused to bargain collectively with representatives of its employees in an appropriate unit. On March 24, 1938, the respondent filed exceptions to the Intermediate Report.

On July 28, 1938, pursuant to permission granted by the Board, the respondent presented oral argument before the Board in support of its exceptions to the Intermediate Report. The Board has considered the exceptions to the Intermediate Report, but save for those which are consistent with the findings, conclusions, and order set forth below, finds them to be without merit.

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[2] Case No. R-600.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Southport Petroleum Company, a Texas corporation organized in 1932, is engaged in the business of refining crude oil and distributing gasoline, fuel oil, and gas oil. The main office and one of the respondent's refineries is located at Kilgore, Texas. The respondent also operates [fol. 65] a refinery at Texas City, Texas, a terminal and docks at Avondale, Louisiana, some oil wells located in Texas, and some pipe lines which are used to gather oil for its refineries.

The refinery operated by the respondent at Texas City, with which we are here concerned, has a capacity of 20,000 barrels of crude oil a day. The average daily consumption is approximately 9,000 to 10,000 barrels. The respondent has a 150-acre tank farm at this refinery which has a storage capacity of 500,000 barrels. Ordinarily 300,000 to 400,000 barrels of crude oil are stored there. The refining of crude oil at Texas City is a continuous process and requires both day and night shifts of workers.

Approximately 75 per cent or more of the crude oil used by the respondent at Texas City is shipped to it in tankers coming through the Gulf of Mexico from Corpus Christi, Texas. This oil originates in the oil fields adjacent to Corpus Christi. Another portion of the crude oil at the Texas City refinery, at times running as high as 30 per cent of the total, comes from Louisiana in the barges of the Southport Transit Company, a corporation controlled by the officers and stockholders of the respondent. The respondent also purchases a small amount of refined oil which is brought from Louisiana to Texas City, where it is canned and resold.

About 33 per cent of the total production at Texas City consists of gasoline. The remaining 66 per cent is made up of fuel oils and gas oils. The respondent sells these products through local salesmen operating in Houston, Texas, and through brokers in New York City and elsewhere. During the year 1936 the gross receipts from sales from the Texas City refinery amounted to approximately $9,000,000. About 10 per cent of the product is shipped

to Avondale, Louisiana, in barges owned by the Southport Transit Company, and sold there by the respondent. Approximately 30 per cent of the product is sold to purchasers [fol. 66] who take delivery in trucks at Texas City. The remaining 60 per cent of the product is loaded in tankers at Texas City, the great bulk thereof being destined for states other than Texas or for foreign countries. About 50 per cent of the tankers carrying the respondent's products purchase bunker oil from the respondent which they use for their own propulsion.

The respondent has a trademark covering one of its brands of gasoline, which is registered with the United States Patent Office for use in commerce between the several States.

II. The Organizations Involved

Oil Workers' International Union, Local No. 227, is a labor organization affiliated with the Committee for Industrial Organization, admitting to its membership all production and maintenance employees regularly employed by the respondent at its refinery at Texas City, Texas, exclusive of office workers and supervisory employees.

International Brotherhood of Boilermakers, Iron Shipbuilders, Welders & Helpers of America is a labor organization. It is affiliated with the American Federation of Labor and with its Building Trades, Metal Trades, and Railway Employees departments, and with the Chief Executives Association of the 21 Standard Railroad Unions. The local lodge at Houston, Texas, admits to membership boilermakers, welders, riveters, caulkers, burners, layers-out, flangers, erecters, helpers, apprentices, etc.

III. The Unfair Labor Practices

A. The refusal to bargain collectively

1. The appropriate unit

The Oil Workers urged as an appropriate unit all of the production and maintenance employees regularly employed by the respondent at its Texas City, Texas, refinery, [fol. 67] exclusive of office workers and supervisory employees. The Brotherhood contends that the employees in the classifications of the boilermaking trade working for the respondent constitute an appropriate unit—that is,

boilermakers, welders, caulkers, their helpers, and apprentices. The respondent maintained that the appropriate unit should consist of all of its employees at Texas City except the manager, superintendent, and assistant superintendent.

In accordance with our usual practice, where no labor organization desires to represent the office workers, salesmen, chemists, and supervisory employees, we shall exclude them from the appropriate bargaining unit because of the dissimilarity between their interests and those of the production employees.

Neither the Oil Workers nor the Brotherhood admits to its membership the special watchman or the truck drivers who are hired with their own trucks by the respondent. The Oil Workers exclude the special watchmen from membership because they are temporary employees hired for special purposes. The Oil Workers exclude truck drivers who are hired with their own trucks from membership because they are looked upon as independent contractors. We find that there is a diversity in the interests of the regular production and maintenance employees and the interests of the special watchmen and the truck drivers who are hired with their own trucks. We shall exclude the two latter classes from the appropriate unit.

The Brotherhood contended that the boilermakers, welders, caulkers, their helpers, and the apprentices to these crafts, constitute an appropriate unit. It based its contention on the Board's decision in Matter of Gulf Oil Corporation and International Brotherhood of Boilermakers, Iron Shipbuilders, Welders & Helpers of America.[3] In that case, in determining that the unit advocated by the Brotherhood was an appropriate one, we said,

[fol. 68] Wherever possible, it is obviously desirable that, in the determination of the appropriate unit, we render collective bargaining of the Company's employees an immediate possibility. In the instant proceeding the record clearly indicates that a majority of the boilermaking employees at the Port Arthur refinery have authorized the Boilermakers to act as their bargaining agent and that that labor organization has for the past four or five years been recognized by the Company as the representative of its

[3] 4 N. L. R. B. 133.

members. On the other hand, there is no evidence that the majority of the other employees at the refinery belong to any union whatsoever; nor has any labor organization petitioned the Board for certification as representative of the refinery employees on a plant-wide basis. Consequently, even if the boilermaking employees do not constitute the most effective bargaining unit, as the Oil Workers contend, nevertheless, in the existing circumstances, unless they are recognized as a separate unit, there will be no collective bargaining agent whatsoever for these workers, who for years have actually engaged in collective bargaining with the Company.

The reasons motivating our determination of an appropriate unit consisting of the boilermaking and welding department in the Gulf Oil case, as urged by the Brotherhood, are not present here. While there is evidence in the record indicating that the boilermakers, welders, caulkers, and their helpers, employed by the respondent at Texas City, desire to be represented by the Brotherhood, the Brotherhood has never bargained with the respondent for them, as was true in the Gulf Oil case. In fact the Brotherhood has never approached the respondent for any purpose up to the time of the hearing. Moreover, in the present case there is evidence that a majority of the employees at the refinery desire to be represented by the Oil Workers, and the Oil Workers have, since June, 1937, attempted to deal with the respondent, and have petitioned the Board for certification as representative of the employees on a plant-wide basis. It is [fol. 69] apparent that the rejection of the unit contended for by the Brotherhood will not act as a deterrent to collective bargaining, as would have been true in the Gulf Oil case.

Specifically, the Brotherhood's claim is that there are 18 persons employed by the respondent at the boilermaking trade, and that persons so employed constitute an appropriate unit. In support of its claim to represent the employees in such unit the Brotherhood introduced a petition signed by 17 of the 18 persons alleged to be working at the boilermaking trade. The pay-roll records of the respondent list 10 of the 17 employees who signed the Brotherhood's petition as laborers, and there is no showing that the employees which the Brotherhood claims are engaged in the boilermaking trades are actually working at boilermaking

or any other operation identified with the boilermaking trade. The Brotherhood has in effect requested that certain individuals be designated as an appropriate bargaining unit. These individuals, however, are not so engaged in the boilermaking trade as to give them an identity of interests clearly distinguishable from the interests of the other employees, which we generally associate with and find in a craft unit. The Brotherhood has not requested a unit which can be termed appropriate for the purposes of collective bargaining. We will therefore include the employees signing the Brotherhood's petition within the larger unit.

We find that the production and maintenance employees regularly employed by the respondent at Texas City, Texas, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and supervisory employees, constitute a unit appropriate for the purposes of collective bargaining and that said unit will insure to employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

[fol. 79] 2. Representation by the Oil Workers of the Majority in the Appropriate Unit

The respondent employed between 220 and 230 persons in the appropriate unit during the period from July 1 to December 1, 1937, and 223 persons during the payroll period ending November 30, 1937. On June 4, 1937, the Oil Workers informed the respondent that it represented a majority of the employees in such unit and at all times thereafter continued to assert this claim.

The secretary of the Oil Workers brought to the hearing 144 membership cards in the Oil Workers, which were signed, he testified, by employees of the respondent. The Oil Workers refused to introduce the cards in evidence and thereby divulge the names of its members to the respondent. As a result it is impossible to ascertain when the cards were signed, or whether or not the signatures are genuine. Nor is it possible to determine whether or not the employees signing them are within the unit which we have found to be appropriate. Moreover, 34 employees advised La Ferney, the manager of the Texas City refinery, during the months preceding the hearing that they no longer desired to be rep-

resented by the Oil Workers, and that they had discontinued their membership in the Oil Workers.

On the record before us, we cannot find that on June 4, 1937, or at any time thereafter the Oil Workers represented a majority of the persons employed by the respondent in the unit which we have found to be appropriate for purposes of collective bargaining. We find that the respondent has not refused to bargain collectively with the representative of its employees in an appropriate unit.

We will order that the complaint be dismissed in so far as it alleges that the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

[fol. 71] B. The Discriminatory Discharges

The complaint alleged that the respondent discharged William Cornish, Earl Gooch, Edward A. Patricio, and E. D. Richey because they joined and assisted the Oil Workers. The respondent's answer admitted the discharges, but alleged that they were made for incompetency, insubordination, and because of a lack of work.

The alleged discriminatory discharges must be viewed in the light of certain circumstances which reflect the attitude of the respondent toward the organization of its employees. In the spring of 1937, just after the respondent had given its employees an increase in wages, Lee La Ferney, the manager of the Texas City refinery, addressed all of the employees at a meeting at noon, and told them, among other things, that there were outside interests at work in the plant and that the employees should be careful as they only wanted the employees' money. This occurred at a time when the Oil Workers had organized a substantial number of the respondent's employees. In June La Ferney expressed his position to William Cornish more clearly. According to Cornish's testimony, La Ferney said that he was not against labor organization, "but if we knew what he knows about the executives of the organization we were in, we would get out guns and go after them." La Ferney went on to explain that he would like to see a union of the men in the plant, without any outside executives. La Ferney maintained this position when the Oil Workers attempted to negotiate with the respondent during the succeeding months. These statements were calculated to have an

added effect upon the men because, as La Ferney pointed out in his spring speech, he had once been organizer for the International Association of Oil Field, Gas Well, and Refinery Workers, the predecessor to the Oil Workers.

On October 8, 1937, Earl Gooch, who had been discharged from the Texas City refinery in August, talked to M. M. Travis, the secretary of the respondent, at Kilgore, Texas. [fol. 72] Travis told Gooch, "Don't let outside activities interfere with your work and your efficiency, because Mr. Lewis will look after himself, and it is up to you to look after yourself."

Early in the fall G. Tate, the chief chemist, handed Foy Hopkins, one of his subordinates and a member of the Oil Workers, a copy of an Oil Workers' publication entitled Things * * * Every Oil Worker Should Know. Tate had crossed out the word "Things" in the title, and had written underneath the remainder of the title, "Enough to take care of his job and let the other fellow do likewise."

Keeping in mind the attitude of the respondent toward the Oil Workers, as expressed by the actions of some of its supervisory employees noted above, we turn to a consideration of the circumstances surrounding the discharge of each of the employees involved.

E. D. Richey. E. D. Richey was employed by the respondent as a boiler repairman from December 1935 until he was discharged on October 15, 1937. During the course of his employment he received three raises in pay, the last one, fixing his pay at 85 cents an hour, about 4 or 5 months before his discharge. No complaints were ever registered against his work, and it was always passed by the State Boiler Inspector.

Richey joined the Oil Workers in June 1937. He was active on its behalf, and frequently wore his button at the plant. On September 20, 1937, he was elected steward of the Oil Workers. Prior to his discharge he was a member of the Organizing Committee of the Oil Workers.

V. Q. Davis, Richey's brother-in-law and foreman, discharged him on October 15, for coming on the job intoxicated. Davis explained that Richey came to the refinery intoxicated on a Wednesday night and failed to do his work. Thursday Davis secured authority from Hinds, the superintendent, to discharge Richey. However, Davis did not [fol. 73] discharge Richey on Thursday, and his work was satisfactory. Davis testified that Friday night Richey was

intoxicated again and failed to perform his duties, and that on Saturday he discharged him. Richey admitted that Davis had spoken to him at home and told him that if he did not stop running around to the saloons he would be discharged, but testified that he never drank on the job and never came to work intoxicated. J. C. Greathouse, who worked alongside of Richey on certain shifts, testified that he had never seen Richey drinking at the refinery and had never seen him drunk during working hours. H. B. Hilliard, another employee, testified that he saw and talked to Richey the last night that he was employed, and that Richey was working that Friday night and was not intoxicated.

After his discharge Richey spoke to both Hinds and Davis, each of whom indicated that the other had been responsible for his discharge. Upon request Davis gave Richey a recommendation on the respondent's letterhead which read as follows:

Oct. 18, 1937.

To whom it may concern:

Mr. E. D. Richey was employed at our plant as a boiler maker since December 26, 1935. His work was satisfactory. We or I, the undersigned, unhesitately recommend him for such work.

V. Q. Davis, Forman Engineer.

We find from all of the evidence that Richey was not intoxicated while working for the respondent on the three nights prior to his discharge. We also find that he was discharged because he joined and assisted the Oil Workers, and that by such discharge the respondent had discriminated in regard to his hire and tenure of employment, and has thereby discouraged membership in the Oil Workers. We further find that by such action the respondent has interfered with, restrained, and coerced its employees [fol. 74] in the exercise of the rights guaranteed under Section 7 of the Act.

Prior to his discharge Richey earned 85 cents an hour, and worked 8 hours a day, 5 days a week. He earned $3.36 from the time of his discharge up to the time of the hearing. He desires to be reinstated.

William Cornish. William Cornish was hired by the respondent at the Texas City refinery as an electrician on June 24, 1935, and remained in that capacity until he was

discharged on August 4, 1937. Even after his discharge J. C. Hinds, the superintendent, characterized him as a good electrician.

Cornish joined the Oil Workers about June 1936. As a member of the Organizing Committee he was one of its most active members. In March 1937 he was made a member of the Workmen's Committee which was formed to bargain with the respondent for the Oil Workers. In this capacity Cornish had several conferences with La Ferney. In July Cornish was elected vice president of the Oil Workers. Less than a month later he was discharged.

Superintendent Hinds stated that he discharged Cornish "for continually leaving the job without informing anyone where he was going or why." Cornish was paid a monthly salary, and worked 5 days a week. He was free to choose the day of the week he was to take off. Hinds testified that Cornish was required to notify him what day he would not report for work. Cornish testified that he had been told to notify his fellow workers rather than Hinds, and that he always told Meadows, his helper. Meadows testified that he had always received such notification from Cornish. Hinds and Smith, the assistant superintendent, testified, however, that on several occasions they had warned Cornish about going off the job without informing his superiors. Cornish denied having received such warnings. In any event no disciplinary action was ever taken.

[fol. 75] During the month of July Cornish was having an extensive amount of dental work done. On Friday, July 30, he had an appointment to visit his dentist. On Thursday, July 29, the dentist called the refinery and left word with La Ferney that he could not see Cornish on Friday, but that he would see him on Tuesday, August 3. La Ferney delivered the message to Cornish. Cornish worked on Friday, but went to the dentist on Tuesday. On Monday Cornish told Meadows he would not report to work on Tuesday. The dentist did not finish with Cornish on Tuesday, and Cornish went back to see him on Wednesday. As a result he came to work between 9:30 and 10 o'clock on Wednesday morning although he should have been there at 7 o'clock. Cornish telephoned Meadows on Wednesday morning and reported that he would be in late. Shortly after he came to work Hinds discharged him.

A. R. Quinn replaced Cornish. Quinn had applied to La Ferney for a job on Monday, August 2, at which time La

Ferney told him there was going to be a change and that he would keep him in mind. On August 4, after Cornish had been discharged, La Ferney called Quinn, who started to work for the respondent on August 5.

We find that William Cornish was discharged because of his activity on behalf of the Oil Workers, and that by such discharge the respondent has discriminated in regard to his hire and tenure of employment, and has thereby discouraged membership in the Oil Workers. We also find that by such action the respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed under Section 7 of the Act.

Prior to his discharge Cornish earned $185 a month, working 8 hours a day, 6 days a week. After his discharge, Cornish was unable to get a job until September 7, when he was hired as a Frigidaire serviceman. Cornish earned $369 on that job up to December 1. He desires reinstatement.

[fol. 76] Earl Gooch. Earl Gooch was employed by the respondent for 4½ years, at the Texas City refinery for the past 2½ years. Prior to the termination of his employment on August 4 he was working as a welder. Gooch received several wage increases while working for the respondent, the last increase, which came about a month before his discharge, fixing his pay at 90 cents an hour. No complaints were ever made about his work.

Gooch joined the Oil Workers in February 1937. About May 1 he was elected acting secretary and as member of the Organizing Committee was one of the most active members of the Oil Workers.

On August 4, the same day that William Cornish was discharged, Hinds told Gooch he was being permanently transferred to the respondent's refinery at Kilgore. Gooch obtained an advance for travel expenses and proceeded to Kilgore, where he was put to work for an independent contractor named Ulmer, who was doing some construction work for the respondent at the Kilgore refinery. Early in October when Gooch's work with Ulmer was completed he talked with M. M. Travis, the secretary of the respondent in regard to further work. Travis, after indicating to Gooch that union activity was impairing his efficiency, told him that the respondent had no more work for him

at Texas City, and that he had only been called to Kilgore because there was work available for him with Ulmer. Gooch, although ostensibly transferred to the respondent's Kilgore refinery on August 4, was, in fact discharged on August 4.

Just before Gooch was sent to Kilgore, the respondent transferred another welder, Grady Suttles, from Kilgore to Texas City. Gooch was discharged because, with Suttles working at Texas City, there was not enough work for him to do. Travis, the secretary of the respondent, was the only witness to testify as to the reasons for the transfer of Suttles, and he admitted that his knowledge was obtained from other officers of the respondent after the transfer. He first stated that Suttles was transferred to Texas City [fol. 77] because he was desirous of making the change due to illness in his family. Subsequently, he indicated that the respondent transferred Suttles because Gooch was not capable of working on pressure units and because Suttles was senior in service to Gooch. The recognition by the respondent of the difference in capabilities of the two men was expressed by the payment of $1.05 per hour to Suttles and 90 cents per hour to Gooch. However, Gooch had welded both flat work and pressure units for the respondent, and when Travis called the Texas City refinery for "expert welders" to work for Ulmer at Kilgore, Hinds sent him Gooch. Moreover, after his discharge Gooch obtained a temporary job as welder with the Sinclair Refining Company. A. Mochel, the welding foreman at the Sinclair Refining Company, testified that to get the job Gooch took a competitive examination, and was 1 of 5 out of 15 who were hired. He also testified that Gooch's work was satisfactory even on pressure units. Sinclair Refining Company paid Gooch $1.15 an hour. While the respondent has differentiated in the hourly rates of Suttles and Gooch it has not differentiated in the type of welding that they were assigned to do, and Gooch was in fact able to weld pressure units. Although the respondent's classification of Gooch and its opinion of his capabilities are entitled to great weight, the evidence impels us to the conclusion that the respondent's actions cannot be ascribed to the reasons it here offers. We cannot accept the respondent's contention that Suttles' transfer which resulted in Gooch's discharge was made because Gooch was not a good welder capable of welding pressure units.

The respondent also contends that Suttles was properly allowed to replace Gooch because he was senior in service to him. In this connection it should be noted that Suttles' seniority was determined on an employer basis; that there was no evidence to show that the respondent had customarily adopted an employer seniority rule in its two refineries which were over 200 miles apart; and that Gooch was senior in service at the Texas City refinery. In any event there is no affirmative showing that the respondent was [fol. 78] aware of or considered the fact that Suttles was senior to Gooch on an employer basis at the time the transfer was made. We are constrained to reject the respondent's contention that Suttles' transfer to Texas City and the resultant displacement of Gooch was proper because of Suttles' seniority.

On August 4, at the time Gooch was discharged because Suttles' presence in Texas City created an excess of welders, Jack Wilson, another welder, was retained in the respondent's employ at Texas City. Gooch was senior in service to Wilson, Wilson, like Suttles, received $1.05 an hour, but his work was similar to that performed by Gooch. If the respondent properly followed seniority in allowing Suttles to transfer to Texas City, thus necessitating the dismissal of a Texas City welder, then it obviously discriminated against Gooch thereafter by dismissing him while retaining Wilson, who was junior in service to him, in its employ.

We find that Earl Gooch was discharged because he joined and assisted the Oil Workers, and that by such discharge the respondent has discriminated in regard to his hire and tenure of employment, and has thereby discouraged membership in the Oil Workers. We also find that by such action the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed under Section 7 of the Act.

Prior to his discharge Gooch earned 90 cents an hour, working 40 hours a week. From August 5 to October 8 he earned $369 working for the Ulmer Pipe Line Co. Thereafter, he also earned $141.20 working for the Sinclair Refining Company prior to the hearing. He desires to be reinstated.

E. A. Patricio. Patricio was employed by the respondent for 18 months prior to his discharge on August 13,

1937. He worked as a truck loader 4 days a week and as a manifest clerk 1 day a week. The record shows that his work was satisfactory.

[fol. 79] Patricio was a member of the Oil Workers and wore his button at the plant occasionally. He talked to some of the other employees about joining the Oil Workers, but was not an officer of the Oil Workers or a member of any of its committees.

Patricio was discharged after having been accused of writing derogatory remarks about La Ferney on the walls of the lavatory. Before discharging Patricio the respondent attempted to prove that he had been responsible for the writing in question. After the investigation La Ferney said to Patricio, "I am not quite convinced it is your writing, but I have heard you have said things about me, and that you were not satisfied out here, so therefore I am going to have to let you go."

The Trial Examiner found that Patricio was not discharged because of his membership in and activity on behalf of the Oil Workers. The Oil Workers did not except to the finding of the Trial Examiner.

Upon the evidence before us we find that Patricio was not discharged because of his membership in the Oil Workers. We will order that the complaint be dismissed with respect to him.

IV. The Effect of the Unfair Labor Practices on Commerce

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

We shall order the respondent to make the discharged employees whole for any loss of pay they have suffered by [fol. 80] reason of their respective discharges by payment to each of them of a sum equal to the amount which he normally would have earned as wages from the date of his

discharge to the date of the offer of reinstatement, less his net earnings [4] during said period.

VI. The Question Concerning Representation

On June 4, 1937, the Oil Workers wrote to the respondent stating that it represented a majority of the respondent's employees and asking that a date be set for collective bargaining. Similar requests were made by the Oil Workers on a number of different occasions during the succeeding months. The respondent refused to meet and negotiate with the Oil Workers because it claimed that it was not subject to the Act, and that the Oil Workers did not represent a majority of its employees.

We find that a question has arisen concerning representation of employees of the respondent.

VII. The Effect of the Question Concerning Representation on Commerce

We find that the question concerning representation which has arisen, occurring in connection with the operations of the respondent described in Section I above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VIII. The Determination of Representatives

In Section III-A-2 above, we examined the evidence introduced by the Oil Workers to show that it represented [fol. 81] a majority of the employees in the unit which we have found to be appropriate in Section III-A-1, above, and concluded that it was insufficient to establish the fact that the Oil Workers represented a majority of the em-

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[4] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but fo his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers, Local No. 2590, 8 N. L. R. B., No. 51.

ployees in such unit. We find that the question concerning representation which has arisen can best be resolved by means of an election by secret ballot.

As the petition requesting an investigation and certification of representatives was filed almost a year ago, we will not follow our usual practice of limiting eligibility to vote to persons in the employ of the respondent at the time such petition was filed, but will provide that those persons employed by the respondent in the appropriate unit during the pay-roll period next preceding the date of the issuance of this Decision and Direction of Election, and those ordered reinstated by this Decision, shall be eligible to vote, excluding those who have since quit or been discharged for cause.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. Oil Workers International Union, Local No. 227, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. The respondent, by discriminating in regard to the hire and tenure of employment of William Cornish, E. D. Richey, and Earl Gooch, and thereby discouraging membership in Oil Workers International Union, Local No. 227, has engaged in unfair labor practices, within the meaning of Section 8 (3) of the Act.

3. The respondent, by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

[fol. 82] 4. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

5. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (5) of the Act.

6. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act, with respect to the discharge of E. A. Patricio.

7. A question affecting commerce has arisen concerning the representation of employees of Southport Petroleum Company, Texas City, Texas, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

8. The regular production and maintenance employees of the respondent, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and supervisory employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Southport Petroleum Company, Texas City, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

[fol. 83] (b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to William Cornish, E. D. Richey, and Earl Gooch immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

(b) Make whole William Cornish, E. D. Richey, and Earl Gooch for any loss of pay they have suffered by reason of

their discharge by payment to each of them, respectively, of a sum of money equal to that which he would normally have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less the net earnings of each, respectively, during said period;

(c) Post immediately notices in conspicuous places at its Texas City, Texas, refinery stating that the respondent will cease and desist in the manner aforesaid, and maintain said notices for a period of thirty (30) consecutive days from the date of posting;

(d) Notify the Regional Director for the Sixteenth Region within ten (10) days from the date of this order what steps the respondent has taken to comply herewith.

And it is further ordered that the complaint be, and it hereby is, dismissed in so far as it alleges that the respondent has engaged in unfair labor practices within the meaning of Section 8 (5) of the Act, and in so far as the allegations of the complaint relate to E. A. Patricio.

[fols. 84-88] DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

Directed that, as part of the investigation authorized by the Board to ascertain representatives for collective bargaining with Southport Petroleum Company, Texas City, Texas, an election by secret ballot shall be conducted within fifteen (15) days from the date of this Direction, under the direction and supervision of the Regional Director for the Sixteenth Region, acting in the matter as agent for the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among the regular production and maintenance employees who were employed by Southport Petroleum Company as its Texas City, Texas, refinery, at any time during the pay-roll period next preceding the date of the issuance of this Direction of Election, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and

supervisory employees, and those employees who quit the employ of the respondent or were discharged for cause between such date and the date of election, but including those employees whose reinstatement was ordered by the above Order, to determine whether or not they desire to be represented by Oil Workers International Union, Local No. 227, for purposes of collective bargaining.

[fol. 89] BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-477

In the Matter of

SOUTHPORT PETROLEUM COMPANY

AND

OIL WORKERS INTERNATIONAL UNION, LOCAL NO. 227

National Labor Relations Board. Jul. 25, 1939. Docket J.

STIPULATION

The National Labor Relations Board, hereinafter called the Board, on August 4, 1938, having issued its Decision and Order in the above-entitled matter, requiring the Southport Petroleum Company, hereinafter called the Company, to cease and desist from certain practices and to take certain affirmative action, and it being the desire of the parties hereto to enter into an adjustment of the matters

It is hereby stipulated and agreed by and between the parties hereto that:

1. The Company, its officers, agents, successors and assigns agree to cease and desist from:

(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organi-[fol. 90] zation of its employees, by discharging its employees, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-

organization to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. The Company, its officers, agents, successors and assigns, agree to offer to William Cornish, E. D. Richey and Earl Gooch within ten (10) days of the date of the approval of this Stipulation by the Board immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges, said reinstatement to take place within thirty (30) days of the date of the approval of this Stipulation by the Board, it being understood that William Cornish, E. D. Richey and Earl Gooch shall signify their acceptance of the offer of reinstatement within fifteen (15) days of receipt of same and that they shall be allowed the full thirty (30) days in which to prepare to come to work if desired by them.

3. The Company, its officers, agents, successors and assigns, agree to post immediately notices in conspicuous places at its Texas City, Texas, refinery, containing the following language and maintain said notices for a period of thirty (30) consecutive days from the date of posting:

Southport Petroleum Company, its officers, agents, successors and assigns, will cease and desist from:

(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organiza-
[fol. 91] tion of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

4. Compliance with the terms of this Stipulation shall by all parties hereto be considered as compliance with the terms of said Decision and Order of the Board dated August 4, 1938.

5. The Company, its officers, agents, successors and assigns agree not to seek to review and set aside said Decision and Order of the Board dated August 4, 1938.

6. The Board, provided the terms of this Stipulation are complied with by the Company, will not seek to enforce said Decision and Order of August 4, 1938; in the event the Company does not comply with the terms of this Stipulation the Board may disregard the terms of this Stipulation and take such action deemed advisable including enforcement of its Decision and Order through the Court.

7. It is understood and agreed that this Stipulation is subject to the approval of the Board and shall become effective immediately upon the granting of such approval.

Signed this 27 day of June, 1939.

F. W. Fischer, Attorney for the Southport Petroleum Company.

[fols. 92-95] Signed this 21st day of June, 1939.

Winthrop A. Johns, Attorney, National Labor Relations Board.

UNITED STATES OF AMERICA,
National Labor Relations Board:

I, Nathan Witt, Secretary of the National Labor Relations Board, and official custodian of its records, do hereby certify that attached is a full, true, and complete copy of: the Board Minute of July 21, 1939 in the Southport Refinery Company case:

Southport Refinery Company, Texas City, Texas, C-477: The Board approved the settlement.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the National Labor Relations Board to be affixed this 24th day of April, A. D. 1940, at Washington, D. C.

Nathan Witt, Secretary. (Seal.)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

APPLICATION OF RESPONDENT FOR LEAVE TO ADDUCE ADDITIONAL MATERIAL EVIDENCE—Filed August 21, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, NOVEMBER TERM, 1939

No. 9517

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

SOUTHPORT PETROLEUM COMPANY, Respondent

Application to the Court for Leave to Adduce Additional Material Evidence

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

The Southport Petroleum Company, a corporation duly organized under the laws of the State of Texas, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, U. S. C. Supp. IV, Title 29, Sec. 151 et seq.), respectfully applies to this Court for leave to adduce additional evidence, which is material to this cause, and which evidence could not be given at the hearing before the Board in the proceeding before the Board entitled "In the Matter of Southport Petroleum Company and Oil Workers' International Union, Local #227, Case #C-477 and R-600", and in support of this application, this respondent respectfully shows:

(1)

That this respondent is a Texas corporation and was engaged in business in the State of Texas within this Judicial Circuit, during the hearing conducted by an Examiner of the Board in connection with the above cause, and so conducted its business in the State of Texas until on or about June 30, 1939, when this respondent liquidated and discontinued all operations.

(2)

That on or about June 30, 1939, this respondent liquidated all of the assets of the corporation by declaring a liquidat-

ing dividend to its stockholders, said liquidating dividend consisting of all of the assets of the corporation. That said assets consisted of a refinery in Kilgore, in East Texas, and oil properties in East Texas, and a refinery in Texas City, in South Texas; that said liquidating dividend was distributed among the four (4) stockholders; namely, Cornelius Kroll, who owned 1500 shares of the capital stock; G. G. Kroll, who owned 1500 shares of the capital stock; M. M. Travis, who owned 1500 shares of the capital stock, and E. M. Travis, who owned 1500 shares of the capital stock of the Southport Petroleum Company, a Texas corporation. That the said M. M. Travis and E. M. Travis received the Kilgore refinery and the East Texas oil holdings of the Southport Petroleum Company, and the said Cornelius Kroll and G. G. Kroll received the Texas City refinery and the properties in South Texas.

(3)

That in pursuance to the requirement of Section 148 (d) of the Revenue Act of 1938, the Southport Petroleum Company, within thirty (30) days after said liquidation, filed in Washington, D. C., a return of information on Form #966, and same was mailed by registered mail on July 26, 1939, to the Commissioner of Internal Revenue in Washington, D. C.

(4)

That the said Cornelius Kroll and G. G. Kroll transferred and conveyed the refinery at Texas City to a corporation known as the Southport Petroleum Company of Delaware, a Delaware corporation; that the owners of the stock of Southport Petroleum Company of Delaware, were never the owners of any of the stock of the respondent herein, and the Southport Petroleum Company of Delaware is a new corporation which did not exist at the time of the hearing before the Board, and the Southport Petroleum Company of Delaware is the present operator of the refinery at Texas City.

(5)

That the Southport Petroleum Company, a Texas corporation, the respondent herein, no longer operates any refinery and is not in any active business, and, therefore, it would not be practical for the Court to enter any order against said liquidated corporation known as the Southport Petroleum Company, a Texas corporation and respondent herein,

because said corporation owns no assets and has not engaged in any business since its liquidation on or about June 30, 1939.

(6)

That there were reasonable grounds for failure to adduce such evidence in the hearing before the Board, its member, agent or agency, because the liquidation of the Southport Petroleum Company, a Texas corporation, respondent herein, by the declaration of a liquidating dividend of all of its assets, occurred on or about June 30, 1939, or after the hearing conducted by the Examiner representing the National Labor Relations Board, and after the Board filed its Order on August 4, 1938, and, therefore, this respondent could not have adduced such evidence before the Board issued its Order of August 4, 1938.

That in view of these developments, this respondent prays that the Court issue its order that such additional material evidence be taken before the Board, its member, agent or agency, and that same be made a part of this Transcript, as provided under Title 29, Section 160 (e), Volume 29, 30, U. S. C. A., page 73 (cumulative pocket parts), and upon said facts being made part of the record, this Honorable Court dismiss this proceeding, because the respondent cannot reinstate any employees and cannot carry out any other orders of the Board, for it is not engaged in conducting any business.

Harry Dow, Attorney for Respondent.

THE STATE OF TEXAS,
County of Harris:

Cornelius Kroll, being first duly sworn, states that he is president of the Southport Petroleum Co., a Texas corporation, and is authorized to and does make this verification in behalf of said corporation:

That he has read the foregoing application and motion and that the statements made therein are true to the best of his knowledge, information, and belief.

Cornelius Kroll.

Subscribed and sworn to before me this 15th day of August, 1940. Mary Schaub, Notary Public in and for Harris County, Texas. (Seal.)

OPPOSITION MEMO TO APPLICATION FOR LEAVE TO ADDUCE ADDITIONAL MATERIAL EVIDENCE—Filed September 28, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, OCTOBER TERM, 1939

No. 9517

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

SOUTHPORT PETROLEUM COMPANY, Respondent

On Petition for the Enforcement of an Order of the National Labor Relations Board

MEMORANDUM IN OPPOSITION TO APPLICATION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

This memorandum is submitted by the National Labor Relations Board, petitioner in the above-entitled matter, in opposition to the application filed by Southport Petroleum Company, respondent, for leave to adduce additional evidence before the Board pursuant to Section 10 (e) of the National Labor Relations Act (49 Stat. 449, U. S. C. Supp. V, Title 29, Sec. 151 et seq.). The Board herein respectfully prays that the motion be denied or, in the alternative, that this Honorable Court withhold decision upon respondent's application until hearing of the merits of the case.

Statement

On August 4, 1938, the Board, upon full proceedings had before it, issued its decision in the case, reported at 8 N. L. R. B. 794, setting forth its findings of fact, conclusions of law and order. In brief, the Board found that respondent had violated Section 8 (1) and (3) of the Act by discharging three named employees because of their union membership and activity. The Board ordered respondent to cease and desist from its unfair labor practices, to reinstate with back pay the employees discriminated against, and to post appropriate notices. On June 27, 1939, respondent entered into an agreement of settlement, subject to approval by the Board, in which it was provided that respondent would cease and desist from the unfair labor practices found, offer

reinstatement to the three employees discriminatorily discharged, and post specified notices. It was further agreed that the parties would not seek review or enforcement of the Board's order provided respondent would comply in full with the terms of the stipulation, but that in the event respondent failed to comply therewith, the Board would be free to take appropriate steps for enforcement of its order in full. The stipulation was approved by the Board and became effective on July 21, 1939; respondent was so notified. Respondent, however, did not comply with the terms of the stipulation, and, on April 17, 1940, the Board served notice upon respondent that it would proceed by appropriate action for full enforcement of its order. On April 26, 1940, the Board, pursuant to Section 10 (e) of the National Labor Relations Act, filed with this Court its petition for the enforcement of its order as aforesaid.

Respondent has not filed or served any answer to the petition for enforcement. Instead, respondent, on August 15, 1940, filed, and on August 23, 1940, served upon the Board, an application for leave to adduce additional evidence. The evidence which respondent seeks to adduce, in brief, is as follows: That on or about June 30, 1939, respondent declared a liquidating dividend of all its assets, consisting of two oil refineries and various oil properties in Texas, among the four persons who were the owners and holders of its corporate stock; that the refinery and properties in Texas City, Texas, at which the unfair labor practices found by the Board occurred, were distributed to two of its stockholders, who thereafter transferred and conveyed the refinery to a new corporation not in existence at the time of the issuance of the Board's order and the stockholders of which were never the owners of any of the stock of respondent; that the new corporation is the present operator of the refinery at Texas City; and that respondent no longer operates any refineries and is not in any active business.

On the basis of these representations, respondent claims that "it would not be practicable for the Court to enter any order against said liquidated corporation and respondent herein, because said corporation owns no assets and has not engaged in any business since its liquidation on or about June 30, 1939." We show herein (1) that the additional evidence sought to be adduced is not material and hence does not meet an essential requirement of Section 10 (e)

which limits the conditions under which the Court may permit additional evidence to be adduced; and (2) that if the Court should have any doubt in the matter, it should withhold its decision on respondent's application until hearing on the merits.

1. The application should be denied since the additional evidence sought to be adduced is not material as required by the Act. Section 10 (e) of the Act provides that—

> * * * If either party shall apply to the court for leave to adduce additional evidence *and shall show to the satisfaction of the court that such additional evidence is material* and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board * * *, the court may order such additional evidence to be taken before the Board * * *. [Italics supplied.]

The sole issues before this Court upon the petition for enforcement are whether the Board's findings that respondent has violated Section 8 (1) and (3) of the Act are supported by substantial evidence and whether the Board's order is valid and proper under the Act. In sum, the question at this time is only whether the order was "lawful when made." National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 272. The evidence sought to be adduced plainly is not material to that question. Assuming, arguendo, the facts to be as respondent has represented in its application, they are not addressed to the merits of the case, but are merely in the nature of a plea in avoidance going to the present ability of respondent to comply with the terms of the order. But that is not a question now before the Court. That is solely a question of compliance to be determined after the order has been reviewed and it is determined that the Board is entitled to enforcement. The applicable authorities so hold. Thus in National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 272, the Supreme Court squarely held that

> * * * an order of the character made by the Board, *lawful when made, does not become moot because* * * * *changing circumstances indicate that the need for it may be less than when made.* [Italics supplied.]

See also Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 230; National Labor Relations Board v. Pure Oil Co., 103 F. (2d) 497 (C. C. A. 5). And in National Labor Relations Board v. Carlisle Lumber Co., 99 F. (2d) 533, 541 (C. C. A. 9), cert. den. 306 U. S. 646, the Court stated:

> If occurrences subsequent to the order of the Board were material it would be impossible to determine the propriety of reinstatement and back wage orders upon the record made at the Board's hearing—the record upon which this Court has a duty to determine the validity of the order and the respondent's duty to comply therewith. In the interval between issuance of the Board's order and the determination of the matter by the Court, the employees discriminated against might find work elsewhere. Since this could be neither affirmed nor negatived by the record upon which the Board must reach a decision, the Board could never know whether reinstatement with back wages was an appropriate remedy in a particular case, nor could the Court judge the propriety of the order upon the record made before the Board.[1]

The provision of Section 10 (e) for a procedure for the presentation and consideration of evidence after the order of the Board has been issued is entirely consistent with this principle. That section specifically requires that the evidence which it is desired to adduce must be "material." The decisions cited above hold that evidence of events subsequent to the entry of the order of the Board cannot meet this qualification since such occurrences are irrelevant to the validity of the order. Section 10 (e) was designed to allow only the introduction of evidence improperly excluded by the Board (Consolidated Edison case, 305 U. S. at 225-226), or of newly discovered evidence. The condi-

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[1] See also National Labor Relations Board 1. Gerling Furniture Mfg. Co., 103 F. (2d) 683 (C. C. A. 7); National Labor Relations Board v. Oregon Worsted Co., 94 F. (2d) 671, 96 F. (2d) 193 (C. C. A. 9); National Labor Relations Board v. Biles-Coleman Lumber Co., 96 F. (2d) 197 (C. C. A. 9); National Labor Relations Board v. American Potash & Chemical Corp., 98 F. (2d) 488 (C. C. A. 9), certiorari denied, 306 U. S. 643; National Labor Relations Board v. Stackpole Carbon Co., 105 F. (2d) 167 (C. C. A. 3).

tions specified in the section as prerequisite to the consideration of additional evidence are, in substance, a restatement of the rules determining the admissibility of newly discovered evidence in courts of law. See Cyclopedia of Federal Procedure, Vol. 5, Sec. 1481.

Moreover, contrary to respondent's claim, it is clear upon the face of the application that the events alleged to have occurred subsequent to the issuance of the Board's order are not such that disable it from compliance, at least in large measure, with the terms of the order. Orders of the Board made in discharge of the congressional mandate to prevent unfair labor practices (Section 10 (a)) are necessarily prospective in operation. Far from alleging any dissolution, respondent has moved to adduce the additional evidence in its corporate name. The corporation in fact is still in existence. The cease and desist provisions of the order, mandatory under Section 10 (c) of the Act, may, therefore, properly be enforced in order to enjoin respondent from again engaging in the unfair labor practices found should it resume active business operations, if in fact respondent has ceased active operations. So, too, respondent ought to be required upon resumption of operations, if it can not now do so, to offer reinstatement to the employees it unlawfully discharged. In any event, respondent should immediately be required to make whole the employees for any losses of pay incurred by them because of respondent's illegal discrimination. That obligation, of a continuing public character, may not be defeated by respondent's liquidation. Agwilines, Inc. v. National Labor Relations Board, 87 F. (2d) 146, 150 (C. C. A. 5); National Labor Relations Board v. Hearst, 102 F. (2d) 658, 664-666 (C. C. A. 9); Mooresville Cotton Mills v. National Labor Relations Board, 94 F. (2d) 61, 66 (C. C. A. 4); National Labor Relations Board v. Hopwood Retinning Co., 98 F. (2d) 97, on contempt 104 F. (2d) 302 (C. C. A. 2); Cf. National Licorice Co. v. National Labor Relations Board, 309 U. S. 350. The question of the exact extent to which respondent can in fact comply with the order is, as we have already shown, not here material. Enough has been indicated, however, to show that respondent in any event is not, as it claims, totally disabled from compliance.

2. Unless denied, we respectfully submit that the Court should postpone decision on respondent's application until

hearing of the case on the record before it. Other Circuit Courts of Appeals have followed such practice in similar situations. E. g., National Labor Relations Board v. Ford Motor Co., April 12, 1938, and January 18, 1940 (C. C. A. 6); National Labor Relations Board v. Oregon Worsted Co., 94 F. (2d) 671 (C. C. A. 9). This practice is particularly warranted here because of the indications of bad faith on respondent's part and the long delay in presenting its application to the Court. The facts sought to be adduced occurred on June 30, 1939, only 3 days after respondent had entered into a stipulation of settlement with the Board (supra, p. 2). Respondent at no time thereafter even acknowledged the demands of the Board for compliance with its agreement. Instead it has bided its time, and now, more than a year after the events which are alleged to have occurred, and 4 months after the Board has filed its petition for enforcement, when the case is scheduled shortly to come up for hearing, respondent for the first time presents an application which can serve only to cause further delay. This should not be permitted.

Conclusion

For the foregoing reasons, the application of petitioner should now be denied in full. If not now denied, it is submitted that the Court should pass decision upon the application until hearing on the merits of the case.

Respectfully submitted, Robert B. Watts, Associate General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 18th day of September, 1940.

ANSWER OF RESPONDENT—Filed November 14, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, NOVEMBER TERM, 1939

No. 9517

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

SOUTHPORT PETROLEUM COMPANY, Respondent

ANSWER OF RESPONDENT, SOUTHPORT PETROLEUM COMPANY, TO THE PETITION FILED HEREIN BY THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Fifth Circuit:

Now comes the Southport Petroleum Company, and in answer to the petition filed herein by the National Labor Relations Board for the enforcement of its order entered in said proceeding of the Board known as "In the matter of Southport Petroleum Company and Oil Workers' International Union Local #227, Case Nos. C-477 and R-600", this respondent respectfully represents:

I

This respondent has heretofore filed in this cause, a motion or application for leave to adduce additional material evidence to establish as a matter of record, that this respondent discontinued operating a refinery or conducting any business in the State of Texas, on or about June 30, 1939. That thereafter, on October 16, 1940, respondent corporation was formally dissolved, as is evidenced by the photostatic copy of certificate of dissolution attached hereto and made a part hereof; wherefore this respondent prays that this proceeding be dismissed and files this Answer without waiving the motion heretofore filed herein, or this motion to dismiss.

II

This respondent demurs generally to said petition and says that same is insufficient in law to require this respondent to answer herein, and of this respondent prays judgment of the Court.

III

This respondent admits that it was engaged in business in the State of Texas, within this Judicial District, until on or about June 30, 1939, but since said date this respondent has not engaged in the conduct of any refinery or business.

IV

This respondent admits that on August 4, 1938, the National Labor Relations Board entered its order stating its Findings of Fact and Conclusions of Law, and issued an order, part of which is copied in the petitioner's pleadings filed herein, wherein this respondent was ordered:

(1) To cease and desist from:

Discouraging membership in Oil Workers' International Union Local #227, or in any other labor organization, of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment, or any term or condition of employment.

(2) To take the following affirmative action:

(a) Offer to three (3) named employees, William Chester Cornish, E. D. Richey and Earl Gooch, immediate and full reinstatement to their former positions; and

(b) To make said three (3) employees whole for any loss of pay they have suffered by reason of their discharge; and

(c) To post certain notices at its Texas City refinery; and

(d) To notify the Regional Director for the 16th Region what steps the respondent took to comply therewith.

V

In connection with said order, this respondent respectfully avers that same was entered by the National Labor Relations Board on hearsay and inferences, and was not based on substantial evidence, and said order should in all things be set aside and held for naught by this Honorable Court.

In this connection, this respondent alleges that there is no evidence in the record that this respondent discouraged membership in the Oil Workers' International Union Local

=227, or in any other labor organization; that there is no substantial evidence in the record that this respondent interfered with, restrained or coerced its employees in the exercise of the right to self-organization, to form, join or assist labor organizations.

VI

Respondent further says that the order of the National Labor Relations Board, insofar as same required the reinstatement with back pay, of William Chester Cornish, was improper and should not be enforced by this Court, because the finding of said Board that Cornish was discharged because of his activity on behalf of the Oil Workers, has no substantial evidence to support it, the following facts appearing:

(a) Cornish admitted that Friday was his regular day off (Page 275, Rep. Pro.) and that he took all day off Tuesday, and was three hours late on Wednesday, the day of his discharge, without securing the permission of the superintendent or any superior in the refining plant, so to do. (Page 276, Rep. Pro.)

(b) There was a conflict in the evidence as to whether Cornish had notified his assistant of his intention to be off on Tuesday and late on Wednesday; there is in the record no evidence that any superior of Mr. Cornish knew of his intended absence from the plant, until Mr. Hinds, the superintendent of the plant, tried to locate him on Tuesday.

The fact that Mr. Cornish failed to report for work on Tuesday and was three hours late on Wednesday, without having first obtained the permission of any of his superiors so to do, constituted sufficient cause for his discharge; taken in connection with the fact that other and more active members of the same union were not discharged, this fact renders untenable and without foundation, the finding of the Board that he was discharged for union activity.

VII

Respondent further says that the order of the National Labor Relations Board, insofar as same required the re-

and should not be enforced by this Court, because the finding of said Board that Richey was discharged because of his activity on behalf of the Oil Workers, has no substantial evidence to support it, the following facts appearing:

(a) The only direct evidence of the reason for Richey's discharge was the testimony of V. Q. Davis, Richey's brother-in-law, and labor foreman, that Richey came to work on Wednesday evening, October 13, 1937, very much under the influence of intoxicating liquor (Page 576, Rep. Pro.); that Davis had thereupon obtained permission from Mr. J. C. Hinds, superintendent of the plant, to discharge Richey if he repeated the offense, and that Richey had come to work on the evening of Friday, October 15, 1937, "a little bit too drunk to work" (Page 576, Rep. Pro.); and the testimony of Mr. Hinds that he had granted Mr. Davis' request for permission to discharge Richey if he came out on the job intoxicated again (Pages 571, 572, Rep. Pro.).

(b) Richey admitted that he had been drinking "practically every evening" (Page 348, Rep. Pro.), and that about eight or ten days before he was discharged, Davis had told him if he "didn't quit running around to these saloons drinking that he was going to have to let me go" (Page 347, Rep. Pro.).

In this instance, there is direct and uncontradicted evidence that Richey drank; that he had been warned against drinking; that the management had granted the request of its foreman to discharge Richey if he returned to the job intoxicated, and that, in the opinion of the foreman, Richey had thereafter come to work "a little too drunk". Richey did not deny that he had been drinking before coming to work on the evening in question.

The undisputed evidence showing that the management was informed that Richey had come to work intoxicated on two occasions, good cause existed for his discharge, and no inference can be indulged that union activity was the cause of such discharge.

VIII

Respondent further says that the order of the National Labor Relations Board, insofar as same required the re-

instatement with back pay, of Earl Gooch, was improper and should not be enforced by this Court, because the finding of said Board that Earl Gooch was discharged because of his activity on behalf of the Oil Workers, has no substantial evidence to support it, the following facts appearing:

(a) That one Grady Suttles, who was a workman in the Kilgore plant of respondent, and senior in point of time of employment, had, at his own request, by reason of illness in his family, been transferred from Kilgore to Texas City (Page 380, Rep. Pro.); that Suttles was both a boilermaker and a Grade A welder, whereas, Earl Gooch was only a second class welder; that the transfer of Suttles to Texas City rendered unnecessary the further employment of Earl Gooch, for whom respondent thereupon obtained employment with a Mr. Ulmer, at Kilgore.

(b) That Earl Gooch was eligible for reemployment when respondent had work for him (Page 482, Rep. Pro.).

The fact that Earl Gooch was discharged for no other reason, than that his services were no longer needed by this respondent, renders untenable any assumption that Earl Gooch was discharged for union activity.

IX

This respondent admits that on June 27, 1939, its attorney, F. W. Fischer, entered into an agreement with the representatives of the National Labor Relations Board to settle this controversy by offering the above three (3) named employees reinstatement to their former positions, and to post specific notices, but did not agree to make whole any of said employees by reason of loss of salaries due to said discharge; that negotiations for said agreement were entered into, not because of the respondent's feeling of guilt on charges filed against it, but, because this respondent desired industrial harmony and peace in the operation of its refinery, and was willing to give the three (3) discharged employees another chance, rather than be embarrassed with prolonged litigation.

That some few days after such agreement was entered into, by and between the respondent's attorney and the petitioner, this respondent declared a liquidating dividend by the terms of which all the assets were divided among

its stockholders, and that the Texas City refinery was sold by the stockholders receiving the said property as their share of the liquidating dividend, to the Southport Petroleum Company of Delaware, a Delaware corporation, which is a separate and distinct entity and the stockholders in respondent have no interest, and never had any interest, directly or indirectly, in the stock ownership of the said Delaware corporation, all as set out in respondent's motion heretofore filed herein.

X

That the matters complained of and set out in Paragraph VI hereof, were objected to in Section Third, I, (a) of respondent's Exceptions to the Intermediate Report of the trial examiner filed in the proceedings before the Board; those complained of and set out in Paragraph VII were objected to in Section Third, I, (c) of said Exceptions, and those complained of and set out in Paragraph VIII were likewise objected to in Section Third, I, (b) of said Exceptions.

Wherefore respondent respectfully prays that this Honorable Court make and enter its order in this proceeding, with a Decree holding that there is no substantial evidence to justify the Board's order in this case, and dismissing this respondent; and for such other and further relief, general and special, in law and in equity, to which the respondent may be justly entitled.

Southport Petroleum Company, by Cornelius Kroll, President.

The State of Texas,
County of Harris:

Cornelius Kroll, being duly sworn, states that he was the duly qualified and acting President of the Southport Petroleum Company, a Texas corporation, on October 16, 1940; that said Southport Petroleum Company is not now operating any refinery or business; that he has read the foregoing answer subscribed by him and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

Cornelius Kroll.

Subscribed and sworn to before me this the 12th day of November, 1940. Luciel Decker, Notary Public

THE STATE OF TEXAS

Secretary of State

I, Claude A. Williams, Assistant Secretary of State, of the State of Texas, Do Hereby Certify, That Cornelius Kroll, President; M. M. Travis, Secretary, and Cornelius Kroll, Treasurer, of Southport Petroleum Company, a corporation duly and legally incorporated under the laws of the State of Texas, with its principal office at Kilgore, Gregg County, Texas, have this day filed in this office an agreement and consent in writing of stockholders owning all interest of all the outstanding stock of said corporation, consenting and agreeing that said Corporation be dissolved, together with a list of officers and directors of said Corporation, with the postoffice address and place of residence of each, said President, Secretary and Treasurer certifying that said consent to dissolution was the true and correct action of the stockholders.

I further certify that by reason of said action of the stockholders of said Southport Petroleum Company, said Corporation is dissolved.

In Testimony Whereof, I have hereto signed my name officially and have caused to be impressed hereon the Seal of State, at my office in the City of Austin, Texas, this the 16th day of October, A. D. 1940.

Claude A. Williams, Assistant Secretary of State.
(Seal.)

ARGUMENT AND SUBMISSION

Extract from the Minutes of December 2, 1940

No. 9517

NATIONAL LABOR RELATIONS BOARD

versus

SOUTHPORT PETROLEUM COMPANY

On this day this cause was called, and, after argument by Walter B. Wilbur, Esq., Attorney, National Labor Relations Board, for petitioner, and Harry Dow, Esq., for respondent, was submitted to the Court.

OPINION OF THE COURT—Filed January 4, 1941

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 9517

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SOUTH PORT PETROLEUM COMPANY,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washingon, D. C.

(January 4, 1941.)

Before FOSTER, HUTCHESON, and HOLMES, Circuit Judges.

HOLMES, Circuit Judge: Pursuant to hearings had upon complaints filed by the Oil Workers International Union, Local No. 227, against the Southport Petroleum Company, the National Labor Relations Board found that the company was engaging in certain unfair labor practices. Accordingly, the Board ordered the company to cease and desist therefrom, and to take certain affirmative

action.[1] The order is before us on a petition to enforce, requiring us to determine whether it is supported by substantial evidence.

The entire order is based upon the findings of the Board that Cornish, Richey, and Gooch were discharged because of union activities and that, because of the discharges, the employees were interfered with and restrained in the exercise of their rights to organize and bargain collectively through representatives of their own choosing. We shall briefly summarize the evidence relating to the discharge of each, which evidence, in our opinion, adequately supports the findings made by the Board and the order entered thereon.

William Cornish was employed by the Southport Company on June 24, 1935. He was an electrician, and performed his work so well that he was repeatedly praised by his superiors and repeatedly raised in pay. He was one of the first to join the union, and became active in its efforts to organize the employees. He was elected vice-

[1] The order required the Southport Petroleum Company to cease and desist from:

(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization of its employees, by discharging its employees or by otherwise discriminating in regard to . . . employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights . . . guaranteed in Section 7 of the Act.

And to take the following affirmative action:

(a) Offer to William Cornish, E. D. Richey, and Earl Gooch immediate and full reinstatement to their former positions, without prejudice of their seniority and other rights and privileges;

(b) Make whole each of said men for loss of pay suffered by reason of their discharge by paying each a sum of money equal to that which he would normally have earned from the date of his discharge to the date of the offer of reinstatement, less the earnings of each, respectively, during said period;

(c) Post appropriate notices; and

(d) Notify the Regional Director, within ten days of the date of the order, of the steps taken to comply with the order.

president of the union, was named acting secretary of the Texas City branch, was a member of the Workmen's Committee, and chairman of the Organizing Committee. As a member of the Workmen's Committee, Cornish appeared before Lee LaFerney, the manager of the company, more than once in efforts to arrange a conference between the union and the management. He was discharged on Wednesday, August 4, 1937, when he appeared for work at 9:30, two-and-one-half hours after he was scheduled to begin work; he was delayed because of an appointment with his dentist that morning. Cornish failed to notify the management that he would be delayed, contenting himself with notifying his assistant. He testified that his presence was not imperative; that his assistant was capable of performing the routine duties; that he regularly took off one day a week, which day varied with the demands of his work, and of which he was required to give no notice to the management; that the occasion of his discharge was the only time he had been late during his entire employment with the company. On August 2, 1937, the company told an applicant for a job as electrician that they were contemplating making a change, and that he could expect employment soon.

E. D. Richey was discharged by his brother-in-law, a foreman in the plant, allegedly for repeatedly appearing for work in a drunken condition. The foreman testified that he had carried Richey home from work on several occasions in a drunken condition, and that he was too intoxicated properly to do his work on the day of his discharge. Richey denied that he was, or had ever been, drunk or drinking while performing his duties. Fellow workmen testified that they had never seen Richey drinking or drunk while working, and that, in their opinion, his work was satisfactory. The foreman acknowledged that, on each of the occasions when Richey was drunk,

he had assigned work to him. This work was of a nature that, if carelessly performed, might result in serious damage. Less than a month before his discharge, Richey was given the office of Steward in the union, and collected the dues of the members.

Earl Gooch was employed by the company for four-and-one-half years as a welder. He joined the union, was active in soliciting membership in it, was elected acting secretary, and served on the Organizing Committee. On August 4, 1937, which was the date on which Cornish was discharged, Gooch's employment was terminated, under the guise of a transfer, when he was sent to do welding work for an independent contractor engaged in construction work at a branch plant belonging to respondent. After that work was completed, Gooch was informed that he was no longer employed by the Southport Petroleum Company. The officers of the company testified that Gooch was discharged because the company no longer had sufficient welding work to keep him busy, and because his "outside interests" had seriously impaired the value of his services. Several employees testified that another man was transferred to take Gooch's place, and that two subordinate workmen were elevated to the rank of welder subsequent to his discharge.

When the organization of the union was in its inception, LaFerney called a meeting of the employees, at which he mentioned that there were "outside interests" working on the employees which were after the employees' money, not their welfare; and he cautioned the men to be careful. When the union committee went to LaFerney seeking a conference with the management, LaFerney declined the request. He told the committee that, if they knew what he knew about the executives of the union, they would go after them with a shotgun. M. M. Travis, secretary and

part owner of the company, testified that he objected to dealing with his employees through unions. At one time he told Gooch, "Mr. Lewis will look after himself, and it is up to you to look after yourself."

Prior to the discharges of these men, the union employees freely exhibited their union insignias, regularly attended the weekly meetings of the union, and participated in various union activities with enthusiasm. The membership steadily increased. After the three officers of the union were discharged, the members stopped working openly for it, membership lagged, attendance at the meetings dropped sharply, and the forward progress of the union was stopped.

When the treatment accorded each of these employees is considered in the light of the hostility of the management to the union, we think the finding of the Board that they were discharged because of union activities was fully warranted by the evidence. The men were officers in, and most active members of, the union, and their discharges followed closely upon their elevation to union offices. That the purpose of the management was realized is further attested by the cessation of overt union activities by the other employees of the company almost simultaneously with the discharges of the men. It was therefore a fair and reasonable inference of the Board that they were discharged because of their own activities.[2]

Respondent has filed in this court an application for leave to adduce additional evidence to the effect that, subsequent to the entry of the order by the Board, it disposed of all of its assets, and was dissolved. Respondent is a Texas corporation. Under the laws of that state the cor-

[2] International Association of Machinists 1. N. L. R. B. (November 1940), ... U. S. ....; The Solvay Process Co. 1. N. L. R. B. (5ith Circuit, Jan., 1941), ... F. (2) .....

poration, upon dissolution, is continued in existence for a period of three years for the purpose of suing and being sued.[3] Conceding that the dissolution has taken place, it can have no effect upon this proceeding.

Since the order of the Board is in all respects supported by substantial evidence, a decree will be entered directing that it be enforced.

[3] Articles 1388-9, Vernon's Texas Civil Statutes; Chevrolet Motor Co. of Texas v. Morris Auto Co., 269 S. W. 872; Eastman Gardiner & Co. v. Warren, 109 F. (2) 193.

JUDGMENT

Extract from the Minutes of January 4th, 1941

No. 9517

NATIONAL LABOR RELATIONS BOARD

versus

SOUTHPORT PETROLEUM COMPANY

This cause came on to be heard on the petition of National Labor Relations Board for the enforcement of the order of said National Labor Relations Board made on August 4, 1938, "In the Matter of Southport Petroleum Company and Oil Workers International Union, Local No. 227," Case Nos. C-447 and R-600, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that a decree will be entered directing that the order of the Board be enforced.

[fol. 123] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9517

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

SOUTHPORT PETROLEUM COMPANY, Respondent

PETITION FOR REHEARING—Filed January 23, 1941

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Comes now Southport Petroleum Company, respondent in the above-entitled cause, and presents this, its petition for a rehearing, and in support thereof, respectfully sets forth:

(A) On August 4, 1938, the National Labor Relations Board rendered its order upon the usual proceedings had pursuant to Section 10 of the National Labor Relations Act, and ordered this respondent to cease and desist from:

[fol. 124] (a) Discouraging membership in Oil Workers' International Union, Local No. 227;

(b) In any other manner interfering with, restraining, etc., its employees in the exercise of the rights * * * guaranteed in Section 7 of the Act, and to take the following affirmative action:

(a) Offer certain named employees immediate and full reinstatement to their former positions, etc.

(b) Make whole each of said employees for lost pay suffered by reason of their discharge.

(c) Post appropriate notices; and

(d) Notify the regional director, within ten days of the date of the order, of the steps taken to comply with the order.

(B) On April 30, 1940, over one year and eight months after date of its order, the board filed in this Honorable Court a petition for the enforcement of its order of August 4, 1938, and a transcript of the entire record in the proceed-

ings before it in the matter of Southport Petroleum Company and Oil Workers' International Union, Local No. 227, the same being No. C-477 and R-600 National Labor Relations Board.

(C) This respondent filed in this Honorable Court an application for leave to adduce additional evidence to the effect that subsequent to the entry of the order by the board, its stockholders declared a liquidating dividend on June 30, 1939; said liquidating dividend consisting of all the assets of the corporation and said corporation discontinued operating its refinery and ceased doing business. [fol. 125] That this respondent also filed an answer in the proceedings before this Honorable Court urging the granting of said motion to refer the case back to the board for such additional evidence and in such answer further alleged that the respondent was formally dissolved on October 18, 1940, and attached to said answer was a certificate of dissolution issued by the Secretary of State of Texas.

(D) On January 4, 1941, this Honorable Court filed its opinion holding that the board's order should be enforced and that respondent should comply with the order briefly set out in Paragraph A, Subsections a, b, c and d herein.

Respondent respectfully submits that this Honorable Court should set aside its opinion filed herein and grant this respondent a rehearing on the following grounds:

1

This Honorable Court erred in refusing to grant respondent's application for leave to adduce additional evidence to the effect that subsequent to the entry of the order of the board, it disposed of all of its assets and was dissolved, because were such evidence made a matter of record, this Honorable Court would not have required a dissolved and nonexisting corporation to comply with mandatory orders requiring such affirmative action as offering reinstatement, posting notices, etc., etc., all of which this respondent was and is wholly unable to comply with because it no longer operates any business.

[fol. 126]

2

This Honorable Court erred in holding that Article 1388-9 of the Vernon's Annotated Civil Statutes were appli-

cable to a dissolved corporation which had discontinued doing business, by requiring such a corporation to take certain affirmative action, such as reinstating employees and posting appropriate notices, etc.

"* * * It may be that although the board's jurisdiction is not wholly lost (by reason of the dissolution of the corporation) that the scope of its order may be somewhat curtailed in view of the fact that even under the Michigan statute (practically same as the Texas law) the corporation ceases to exist for the purpose of continuing the business for which it was organized. An order which required for its compliance the continuation of such respondent's business as, for instance, the re-employment of unlawfully discharged employees, might well be beyond the power of the board * * *" N. L. R. B. v. Timken Silent Automatic Company, 114 F. 2d 449 (2 C. C. A.).

That the effect of this Honorable Court's order is to require respondent to resume operations which would necessitate the purchase of a refinery, crude oil, the reemployment of men, etc., and which a dissolved corporation, under the above article No. 1388, is not authorized to do.

Should respondent fail to reinstate the employees, or post the notices—neither of which it can do—or to make whole the employees ordered reinstated, and the respondent questions the authority of the board to require back pay since the date of its dissolution, the further effect of this Honorable Court's decision would be to place the respondent [fol. 127] in the unenviable position of being subject to contempt proceedings. Contempt action would attach to the former officials and stockholders of the respondent a stigma which the facts do not justify, and would, further, make difficult a proper presentation of those facts to this Honorable Court. It would be inconvenient for this Honorable Court itself to take testimony on the issue and the submission thereof on allegations by affidavit, including allegations based on information and belief, would, respondent fears, fail to give this Honorable Court an adequate appraisal of the situation which has arisen. See N. L. R. B. v. Bell Oil and Gas Company, 98 F. 2d 405 (C. C. A. 5).

3

That the Honorable Court's order in refusing to grant respondent's motion for leave to adduce the additional

evidence pertaining to its dissolution and discontinuance of operations was depriving this respondent of the rights given it by Section 10 (e) of the National Labor Relations Act, wherein it is provided:

"• • • If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board • • • the court may order such additional evidence to be taken before the Board • • • and to be made a part of the transcript. • • •"

The United States Supreme Court has construed this section as follows:

[fol. 128] "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points. • • •" Ford Motor Co. v. N. L. R. B., 305 U. S. 364.

See, also, Mooresville Cotton Mills v. N. L. R. B., 94 F. 2d 61 (C. C. A. 4) and Mooresville Cotton Mills v. N. L. R. B., 97 F. 2d 959 (C. C. A. 4).

4

This Honorable Court erred in enforcing an order of the board on its petition filed in this court on April 30, 1940, or over a year and eight months after the date of the board's order, because the board did not act promptly in filing the petition and the long delay had the effect of making unenforceable the provisions of the board's order. N. L. R. B. v. Lasalle Hat Co., 105 F. 2d 709 (C. C. A. 3).

5

This Honorable Court erred in failing to take into consideration the verified statement of the respondent contained in its motion to adduce additional evidence that it had dissolved and discontinued doing business on June 30, 1939, and limiting the amount of recovery, if any, of the

discharged employees, Cornish, Rickey and Gooch, to such date of discontinuance of operations by respondent.

6.

This Honorable Court erred in ordering respondent to make whole the three named employees for loss of pay, [fol. 129] if any, suffered by reason of their discharge, because a prerequisite to such an order is the ability of the employer to reinstate such employees, and since the dissolved respondent is unable to reinstate any of its former employees, it should not be subject to any order "to make whole" such employees.

"* * * while the Act permits the board to reinstate with or without back pay, it does not, I think, permit an award of back pay without reinstatement. * * *" N. L. R. B. v. Carlisle Lbr. Co., 99 F. 2d, p. 533 (C. C. A. 9).

To require respondent "to make whole" certain employees which it can not reinstate would be in the nature of a punishment and "the powers granted the board under Section 10 (c) are only remedial, they are designed to enable it to restore the status quo as nearly as possible, had the wrong not been committed: further it may not go." N. L. R. B. v. Remington Rand Inc., et al., 94 F. 2d 862 (C. C. A. 2), certiorari denied 304 U. S. 576, rehearing denied 304 U. S. 590.

7

The Honorable Court erred in sustaining the Board's findings that the three employees named were discharged on account of labor activity, because there was no substantial evidence to sustain such finding and from their own testimony (Cornish having admitted that he took off certain days and came to work late another day, without permission from his employer, see respondent's appendix, pages 2, 3, 6 and 7; Richey admitted that he continuously indulged in intoxicants, although warned by his foreman, [fol. 130] see respondent's appendix, pages 9 and 10; and Gooch admitted that a senior and more experienced employee was placed in his position, see respondent's appendix pages 13, 21, 22, 34 and 35) respondent would have been justified in discharging them had there been no effort to organize its employees. N. L. R. B. v. Thompson Pro-

ducts, Inc., 97 F. 2d 13 (C. C. A. 6). N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 44; N. L. R. B. v. Union Pacific Stages, 99 F. 2d 153 (C. C. A. 9); Agwelines, Inc., v. N. L. R. B., 87 F. 2d 146 (C. C. A. 5).

Wherefore, upon the foregoing grounds, and for the reasons hereinbefore set forth, its is respectfully urged that this petition for rehearing be granted and that the order of the board as now affirmed by this Honorable Court be, upon further consideration, reversed.

Respectfully submitted, Harry Dow, Attorney for Southport Petroleum Company, Respondent.

Certificate of Counsel

I, Harry Dow, hereby certify that I am the attorney and counsel for Southport Petroleum Company, the respondent in the above-entitled proceeding, and that the foregoing petition for rehearing is not presented for purposes of delay or vexation, but is, in my opinion, well founded in law and, fact and proper to be filed herein.

Harry Dow, Attorney for Southport Petroleum Company, Respondent.

[fol. 131] In United States Circuit Court of Appeals

No. 9517

National Labor Relations Board,

versus

Southport Petroleum Company

Order Denying Rehearing—February 1, 1941

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 132] In United States Circuit Court of Appeals

No. 9517

National Labor Relations Board,

versus

Southport Petroleum Company

Decree—February 26, 1941

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order en-

tered on August 4, 1938, "In the Matter of Southport Petroleum Company and Oil Workers International Union, Local No. 227, Case C-477," and was argued by counsel;

On consideration whereof, and this Court on January 4, 1941, having rendered its opinion directing that the aforesaid order of the Board be enforced, it is now hereby

Ordered, Adjudged, and Decreed that Southport Petroleum Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

[fol. 133] (b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to William Cornish, E. D. Richey, and Earl Gooch immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

(b) Make whole William Cornish, E. D. Richey, and Earl Gooch for any loss of pay they have suffered by reason of their discharge by payment to each of them, respectively, of a sum of money equal to that which he would normally have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less the net earnings of each, respectively, during said period;

(c) Post immediately notices in conspicuous places at its Texas City, Texas, refinery stating that the respondent will cease and desist in the manner aforesaid, and maintain said notices for a period of thirty (30) consecutive days from the date of posting;

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[fols. 134-137] (d) Notify the Regional Director for the Sixteenth Region within ten (10) days from the date of this order what steps the respondent has taken to comply herewith.

(Signed) Rufus E. Foster, Judge, United States Circuit Court of Appeals for the Fifth Circuit. (Signed) Joseph C. Hutcheson, Jr., Judge, United States Circuit Court of Appeals for the Fifth Circuit. (Signed) Edwin R. Holmes, Judge, United States Circuit Court of Appeals for the Fifth Circuit.

Dated: February 26th, 1941.

[fol. 138] Supreme Court of the United States

Order Allowing Certiorari—Filed June 2, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the question of the correctness of the denial by the Circuit Court of Appeals of the petitioner's motion to remand to the National Labor Relations Board for further evidence.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 139] In Supreme Court of the United States

Stipulation as to Record—Filed July 28, 1941

Subject to this Court's Approval, it is hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto, that the printed record may consist of the following:

The supplemental proceedings before the United States Circuit Court of Appeals for the Fifth Circuit appearing at pages 96 to 130 inclusive, of the transcript of the record, and the decision and order of the National Labor Relations

Board set forth at pages 61 to 84, inclusive, of the transcript, and the stipulation signed June 27, 1939, pages 89 to 92, inclusive, of the transcript.

The Court may consider matters contained in all other printed volumes filed in the United States Circuit Court of Appeals for the Fifth Circuit and transferred to the office of the Clerk of the United States Supreme Court and consisting of the following:

a. Volume I, Transcript of Record;
b. Appendix to Petitioner's brief;
c. Appendix to respondent's brief.

Morris D. Meyer, Harry Dow, Attorneys for Southport Petroleum Co.

Dated at Houston, Texas, this 21st day of July, 1941.

Charles Fahy, Acting Solicitor General, Solicitor General of the United States.

Dated at Washington, D. C., this 26th day of July, 1941.

[fol. 140] [File endorsement omitted.]

Endorsed on Cover: Enter Morris D. Meyer, File No. 45,361. U. S. Circuit Court of Appeals, Fifth Circuit, Term No. 67. Southport Petroleum Company, Petitioner, vs. National Labor Relations Board. Petition for a writ of certiorari and exhibit thereto. Filed May 1, 1941. Term No. 67 O. T. 1941.